address that specifically in a moment, and that is the easiest way for Your Honor to dispose of this case and, indeed, of all of Gulf Power's claims, is they are out no more money as the 11th Circuit used that phrase. They've shown no missed opportunity.

But I'm jumping ahead.

CHIEF JUDGE SIPPEL: No, you --

MR. COOK: I didn't know if you had further questions.

CHIEF JUDGE SIPPEL: No, you've answered what I've asked.

MR. COOK: Your Honor, good morning, and may it please the Court, as we set out in our trial brief, under the 11th Circuit Alabama Power case, Gulf Power had to show three things in this proceeding:

Number one, proof of individual poles at full capacity;

Two, proof of a consequent loss or lost opportunity in the form of (a) a buyer waiting in the wings you could not be accommodated on a pole or (b) a higher value use provable and quantifiable that it lost out on, and third, it must show an appropriate

methodology for calculating the loss.

Now, we're at the end of the hearing, and it's clear Gulf hasn't proven any of those three points, and I wanted to talk about each element, but begin with the most important one and the one Your Honor's question brought me to a moment ago is the single most important word in this case is "loss." Gulf had to prove a loss and it has not. Why is loss os important? It's simple. This is a takings case. This is not an issue of administrative law for first impression or resolution. This is a case governed by the rule of just compensation.

Mr. Campbell makes reference to trying to reconcile Alabama Power with lots of prior precedent. There's only one rule of precedent hat applies and governs here is we're here to measure just compensation. That's measured by loss to the owner. With no proof of loss, Gulf has failed to prove its claim.

Now, at first we saw in Gulf's Petition for Recon, which is the first thing attached in my handout at Tab 49, page 11. Gulf said, "We want this

proceeding, we want this hearing to come in because, among other things, we have identifiable lost opportunities."

Well we went and we asked in discovery what are those lost opportunities. What have you lost? And the next thing that we attach is from Exhibit 56, answer to Interrogator 9. It says we have no actual loss. Its only argument in that answer was it's deprived of the opportunity to charge us what it called a market value rate.

But APCO rejected that very argument when it said, quote, it would make no sense for the power companies to say that even though we're not out any more money than we were before the taking, we're missing out on the opportunity to sell at what we, the pole owner, deemed the full market price of the pole, and this is the heart of why market value is inapplicable to this case, because a pole owner already receives , as the 11th Circuit said, quote, much more than its marginal cost, more than just compensation from the combination of the make ready payments plus the annual FCC pole cable rate, which

includes a component for profit, by the way.

So just to reinforce that point, it's cost and loss that has to be shown caused by or attributable to the cable operator's attachment. What Gulf charges others or what we are forced to pay municipal co-ops who are governed by 224 is utterly irrelevant to the Alabama Power test in this proceeding. To get more in this case than the just compensation they already receive, loss must be proved, and we direct your attention, in particular, to the Clay v. Humana case that's highlighted in our proposed findings, which came after Alabama Power and said -- it made the point that a party seeking damages under a takings case must prove it has, quote, suffered a los and prove the amount of the loss. And it even went so far as to say it's irrelevant that such a party can continue to charge other parties who are not alleged to have committed a taking a higher or market rate.

What is relevant is has the person you say is the taker caused you a loss. Well, at the hearing Mr. Bowen said there are two kinds of loss. The first

was the inability to charge what we want as market price, but we can cross that off based on what I just said about APCO's explicit language rejecting that.

The only other kind of loss Mr. Bowen identified was he said, "Well, any utility purpose is higher value. It's our pole. Whatever we want to do with it has a higher value than what you're going to do with it."

But that mere opinion of a general amorphous higher value doesn't come close to meeting the APCO standard. As Your Honor concluded in the third discovery order, which is excerpted as well, Gulf can't identify specific needs for space, and equally important, because attachers pay the cost of make ready to maintain their attachments when Gulf has to put in a new transformer bank or add some extra wires, Gulf is never deprived of the opportunity to use its poles to meet its needs. At least there's no proof introduced in the record here.

So APCO's holding requires the utility to prove one thing, a higher valued use for each pole, in other words a specific provable, quantifiable higher

valued use, otherwise the court's reference is to a quote, unquote missed opportunity or foreclosed opportunity make no sense, and Gulf never showed this. There's no testimony at all in this hearing identifying a particular higher valued use on any pole, and indeed, Gulf's answers to Complainant's Interrogatories 34 and 35 and their supplemental answer showed that Gulf had no proof of higher valued use either in the form of reservations of space on particular poles or any other forum.

In fact, Ms. Davis admitted in her direct testimony Gulf does not track its space needs or costs on a pole-by-pole basis, but most important, Gulf came into this proceeding with no proof of a lost sale. Not one instance of a buyer waiting in the wings who could not be accommodated, who came to Gulf, who asked to be allowed to go on the poles.

Gulf said we can't, and oh, we've got a loss as a result. This is exactly the sort of proof that APCO contemplated when it used the term foreclosed opportunity to lease to others, and in the third discovery order at page 3, also excerpted, Gulf

admitted, quote, no instances where it was unable to accommodate an attacher.

What that means on both of the two prongs on loss, no higher valued use, no buyer waiting in the wings. That's the end of the case or should be right there.

Now, Gulf's counsel suggested to Ms. Kravtin that real proof of loss is unreasonable or makes the APCO test meaningless, suggesting that this is an unmeetable standard. You demand proof of a signed contract.

Well, there are a couple of important points in response to this. As the 11th Circuit made clear, Gulf already gets much more than just compensation unless it shows a loss, that it's out more money. In other words, the test that brings us here today is the exception. It's not the rule. So it's not at all surprising that there are going to be very limited circumstances and certainly none have been identified by Gulf where it could get more than its existing just compensation.

A second point is that Gulf came here with

nothing, not a signed contract, not an unsigned contract, not even the name of a potential buyer or lessor of space that couldn't be accommodated.

Instead it relies only upon, in the words of Mr. Spain, a hypothetical buyer. We all hears Mr. Spain admit that he knows of no instances where a potential buyer of space approached Gulf about an opportunity to attach and where Gulf couldn't accommodate.

Of course, this is not surprising because as you just heard a moment ago from Mr. Campbell, they want to use fair market value as a proxy they say for all poles, and that's really important because Gulf wants to charge its higher rates for all of its poles containing Complainant's attachments. This only makes crystal clear that Gulf doesn't believe that it should have to prove any loss.

Indeed, Gulf pins its theory or claim of entitlement in this case on a feeling that, well, cable isn't paying its fair share. We see this in Ms. Davis' use of a replacement cost methodology that allocates over four times the space allocated to cable

as that used by the FCC formula in her use of a brand new pole in her calculations instead of an average cost of an existing poll in Gulf's network.

In fact, she testified that she didn't even know if Complainants were on these brand new poles that she used, and in her use of an allocation for things that Gulf needs for its own electric business, like grounds and arresters, what do these allocations show? That Gulf is trying to exact from Complainants in the name of its takings claim the benefit or value that it thinks cable is getting from attaching to its poles by seeking to charge attachers a greater proportion of its overhead.

And as we point out in our legal brief, this is specifically not sanctioned under case law. APCO quotes the Second Circuit case in Metropolitan Transportation Authority v. ICC, where it said if the Fifth Amendment required a sharing of the overhead cost of ownership, then the petitioners there, the Amtrak who wanted to use the MTA's lines, the MTA would be put in a better position by Amtrak's appearance on the scene.

True Amtrak benefits, but if we know one immutable principle in the law of just compensation, it's that value to the taker is not to be considered only loss to the owner.

But what Ms. Davis' testimony makes clear is that Gulf is trying to be put in a better position than it would be absent cable's attachment, not get compensated for loss, but say, "Hey, cable. You're benefitting. Therefore, we should benefit and we should get more." And it wants to have compensation that exceeds the FCC's compensation by up to ten times, 1,000 percent, and as I mentioned a minute ago, Gulf wants to charge for all poles, not just poles for which it has shown a buyer waiting in the wings for a higher valued use.

And this brings us back to my concluding point on this first of three prongs, which is the single most important point in this litigation is Gulf has proved no loss. Now I want to turn and address what Mr. Campbell spent the bulk of his argument on. Gulf has also failed to identify specific poles at full capacity.

Here the standard is full capacity. That was the phrase used in the Alabama Power case at page 1370 and in your April 15th, 2005 status order where you said the term pole crowding is ambiguous, and the 11th Circuit has held there's no right to consider more than marginal costs unless a pole is at full capacity.

What is full capacity? It's simple. We heard from Patricia Craft in full capacity means someone has to be excluded. Your question during the hearing, Your Honor, about the analogy of an elevator is illustrative. There can be a difference between crowding, where rearrangement can lead to more people coming on and full capacity, where one more person coming on means someone has to get off.

Exclusion is the heart of rivalry and full capacity, not whether a pole requires rearrangement or make ready. It is have they shown they've had to chuck someone out. That is the only thing that would establish full capacity.

Now, Gulf has admitted in this case its historical practice of accommodating attachers through

make ready. You took note of that in one of your orders, and this is an integral part of the permitting process. Gulf has failed to show that it had to exclude anyone, let alone tying an instance of exclusion with proximate cause to our client's attachments.

CHIEF JUDGE SIPPEL: Has the 11th Circuit said anything about that, defined anything that specifically, that is, that in order to prove full capacity you have to show that somebody was actually thrown off of the pole to accommodate the next one?

MR. COOK: We think not other than in the APCO case that I'm aware of, but to answer your question directly, we believe that the references in APCO to a missed opportunity and a foreclosed opportunity means there has to have been an exclusion and a resulting loss. That's the only thing that can mean, is that your poles are so full that you missed out.

Now, if you have an historical, decades old practice that's ongoing, as Mr. Bowen says, of using make ready to make sure that nobody is excluded

and to accommodate all comers, then you haven't reached exclusion and you haven't reached full capacity.

Now, we direct your attention in those handouts, again, to our Exhibit 2, page 5, which says the purpose of make ready is to, quote, provide space for a licensee. Mr. Bowen admitted Gulf voluntarily does make ready, voluntarily allows people on its poles, has historically done make ready, continues to do so, does so for itself, does so for others.

Well, with these points established, it can't come in here and credibly try to turn the use of make ready around on its head and say make ready is proof of full capacity.

As Your Honor noted in a question to Mr. Campbell, Gulf admitted a distinction between crowding and full capacity, but in this case there's been no showing of full capacity on any pole, only of NESC clearance violations that are not only readily correctable with Gulf's own make ready practices, but which as you heard Mr. Haroldson say, have to be corrected to comply with the NESC and which, when

corrected, affect full capacity.

Now, we didn't hear much from Gulf's witnesses about the Osmose pole survey and with good reason. Osmose was only instructed to look at pole crowding and not at full capacity. There are no criteria on full capacity. Osmose didn't consider make ready at all, and this is really important. Gulf's own witness, Mr. Dunn, said, "If you can rearrange attachments through make ready, that can lead to a pole's not being at full capacity."

That admission, Your Honor, is devastating to Gulf's case because Osmose didn't look for any of its poles as to whether you could rearrange. So, again, you have Mr. Dunn saying, "Yes, rearrangement, if you can rearrange to clear up NESC issues, that will mean the pole is not at full capacity."

And yet its own surveyor didn't measure that. Now, Mr. Campbell I can already anticipate is prepared to jump and say, "Well, even if he said that, rearrangement is different from a changeout. A changeout is changing the structure of the pole."

That's not what their other key witness,

Mr. Bowen, said at page 27 of his testimony, where he said it's impractical to distinguish between rearrangements and a changeout. Well, if that's impractical and if rearrangement can lead to no fully capacity and their own surveyor didn't consider whether it's possible to rearrange and use make ready, then Osmose has no probative value in this proceeding. Their admission undercuts their entire position.

Now, Osmose didn't also look at the order of attachment on the poles. Yet Mr. Bowen admitted that if Gulf or other parties caused the safety clearance issues, they had the obligation to take steps to fix those issues.

Another problem with Osmose's work, they just looked at the poles at one time, and even under Gulf's view where an NESC clearance issue equates to crowding, there's no proof in this record about when the safety clearance issue arose, how long it lasted, whether it was fixed, or how long they existed.

Since Gulf is seeking annual pole rental increases in this case for six years or seven years, 2000 through 2006, it has got to have come forward

with some proof of full capacity during each of those years, and yet all it did was one spot check in the spring of 2005 because, as Your Honor took note, they had no proof at all of any capacity issues before that.

And Osmose's accuracy is a real issue here. We started off Mr. Bowen's cross on the stand with the removal of two of the 40 poles. Cross examination then showed that at least one more, and probably two more, did not meet Osmose's own criteria and Mr. Bowen says there were a few occasions where wrong criteria were identified by Osmose.

So Osmose touts its work as having 97 percent accuracy. Well, the 40 poles here didn't even make that cut. There are three or four or more poles had to be removed from their own classification.

And a final problem with Osmose --

CHIEF JUDGE SIPPEL: Let me ask you this.

MR. COOK: Yes.

CHIEF JUDGE SIPPEL: The Osmose surveys, that constitutes considerable more evidence than was submitted in the 11th Circuit, doesn't it?

MR. COOK: It might constitute work that was done, but what is the legal significance of that work? Have they come forward and shown any instance of where someone has been excluded?

CHIEF JUDGE SIPPEL: That's true. The legal significance is important. What I'm simply saying is that the 11th Circuit had nothing comparable to the Osmose study in its analysis.

MR. COOK: I think that's true, but one of the things to keep in mind there is the 11th Circuit, when it was doing the lead-up in discussion of takings law, said, "You know, there's a known fact and unknown fact and a legal principle that essentially bring Alabama Power's case down. The unknown fact is the crowding or the full capacity." It used the term "full capacity" in its text. The known fact was the payment of make ready, and the legal principle was just compensation is only measured by loss to the owner.

What you hear Gulf talking about this morning is, well, we met the unknown fact now, just as Your Honor suggested. We have more evidence. We have

evidence of crowding.

But they completely ignore the other two things that the 11th Circuit took account of, the most important of which is loss, loss to the owner.

But a last word on Osmose. One of its central definitions of crowding was having less than 52 inches between electric and communications space. This points up the artificial nature of this definition because the way pole attachments work is any attacher comes in, pays make ready if needed to get on, and makes sure that there's a 40 inch safety space between communications and electric, but you don't pay for the next guy to come on, too, because it's the next attacher's job, consistent with Gulf's permit which says you pay us the cost and we'll provide the space, to pay for make ready so that that 40 inches is maintained.

So by using its central definition that says, well, there's crowding if there's less than 52 inches, Gulf has artificially set up or defined its definition to lead to these outlandish claims really of 70 and 80 percent of its poles meeting full

capacity.

Now, the knowledge --

CHIEF JUDGE SIPPEL: Say that again. Seventy or 80 percent?

MR. COOK: Right. You saw in the October 31st final report on Osmose that they say through extrapolation 70 to 80 percent of our poles are crowded.

CHIEF JUDGE SIPPEL: But has that been rebutted?

MR. COOK: Well, it has been rebutted in the sense that we have challenged that in multiple ways. One of the chief ways that we point out is that is not based on actual measurements, and in fact, Osmose only looked at the attachments in the Pensacola area of the Cox company, did not look at attachments of any of the other three issues, and there are numerous problems with the Osmose survey that render its reliability -- essentially vitiates its reliability.

So, yes, it has been rebutted, absolutely, and rebutted directly actually by the testimony of

Patricia Kravtin where she talks about why the statistical extrapolation that Gulf employed in that final report is unreliable. Yes, Your Honor.

CHIEF JUDGE SIPPEL: But it's not out of order or it's not unacceptable methodology to use an extrapolation process as long as it's considered to be an appropriate extrapolation process or one that is, say, professionally acceptable; is that right?

MR. COOK: In this case, that's not correct, Your Honor, respectfully.

CHIEF JUDGE SIPPEL: You can use no extrapolations?

MR. COOK: Because Alabama Power standards said before a power company can seek compensation above marginal cost, it must show with regard to each pole that the pole is at full capacity and another buyer of space is waiting in the wings for the higher valued use without such proof.

Again, each pole, and that's why we focused on this way back in early 2005, and your order adopted that same language; without such proof, any implementation of the cable rate which provides for

much more than marginal cost necessarily provides just compensation.

CHIEF JUDGE SIPPEL: Do you think that the 11th Circuit sort of had a tongue-in-cheek approach there to say that, you know, if you can get somebody to climb up every single pole and you can prove beyond a shadow of a doubt that you've got full capacity, then you're not going to succeed in your claim.

MR. COOK: No, I think there was no tongue-in-cheek approach because you have to remember, Your Honor, they already get just compensation. Unless they can identify, go out in the field and identify a specific pole or run of poles where they suffered a loss, can they show a loss, because this is a constitutional standard and the 11th Circuit said you have the burden of showing loss and the burden of showing the amount of the loss. They have to come in with that proof and tie it to a specific pole, set of poles, community of poles. They have to be specific.

And the point is we haven't heard that evidence of loss as to any poles. That is also true, Your Honor, for the ten Knology poles. There's only

one page of testimony by Gulf about these, page 37 of Mr. Bowen's testimony. All it says was that they had done make ready. There was no showing that the poles were or are at full capacity.

When Gulf's counsel questioned Mr. Haroldson about these poles, Mr. Haroldson explained up front in his testimony, well, Gulf had not provided enough information about these poles to gauge their current condition. Mr. Haroldson could say from his experience and the photographs and the data they did provide that there was no reason that they affirmatively come forward and shown in light of Gulf's make ready practices that those poles could not hold more attachments.

CHIEF JUDGE SIPPEL: That took 25 minutes. Do you want to go five more like Mr. Campbell did or do you want to stop?

MR. COOK: Yeah, he had gone 40 from 9:10 to ten of. So if I could --

CHIEF JUDGE SIPPEL: Where are you? You're at 25. You're a little over 25.

MR. COOK: Right. If I can be allotted

the same 40, I would use not all of it, but a little bit more.

CHIEF JUDGE SIPPEL: You can go down to when the big hand hits the five down there.

MR. COOK: Okay.

(Laughter.)

MR. COOK: Very good, Your Honor.

So let me finish up the second prong, which is in addition to failing to show an actual loss. Gulf failed to show poles on which it had been required to exclude others, let alone due to the presence of Complainants' attachments, and therefore, did not establish full capacity.

The third element of my presentation this morning is that Gulf's methodology does not meet the governing legal standards for damages. The replacement cost methodology is not consistent with the standard of loss to the owner. Mr. Dunn's admission on page 28 of his testimony, replacement cost is used as an alternative to taking Gulf's property because an alternative for the taking is for an attacher to construct an independent system of

poles.

Now, you heard Mr. Campbell say, well, you're misrepresenting it. It's not true at all. The value to the attacher.

Well, he's not talking about a little bit of value. Mr. Dunn is saying a lot of value, and our method of damages is based on what you guys would have to go and pay to go out and attach the poles.

Now, Mr. Spain said this is not feasible for cable attachers to duplicate Gulf's pole network. In his final answer to cross examination, page 1253, he admitted Gulf's methodology is based precisely upon the cost cable attachers would pay to go out and try to reproduce Gulf's entire system. That is a standard of benefit or value to the taker, not loss to the owner.

The second point under replacement value methodology, it is unrelated to the APCO standards of either full capacity or lost opportunity. We saw that in Terri Davis' testimony. She used the same methodology Mr. Dunn told her to use in 2000 before the APCO decision and after, and that methodology is

based on the particular number of poles Gulf bought in the prior year, poles which did not even necessarily have Complainants' attachments on them

And here is a really important quote. She said she was looking at replacement costs to avoid actual field conditions that a cable operator might be experiencing with attachments to a particular pole. Mr. Dunn then went on and said Gulf's proposed rate has, quote, nothing to do with a particular pole or its condition.

Mr. Spain said there is no connection between capacity on poles and the rate of $40.60. That one statement right there says it all. They come in. They want a rate of $40.60. They've got an expert. He says, "Oh, I don't know of any connection between the rate that they want and the capacity on the poles."

Well, that also sinks their case right there. There is no connection between Gulf's methodology and the rate it derives from that methodology, and either the capacity of the poles containing Complainant's attachments or any loss.